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4 Attorney for Material Witnesses
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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 Hon. LOUISA PORTER
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13 UNITED STATES OF AMERICA,)	Case No. 08CR0212JLS
)	Mag. No. 08MJ8417
14 Plaintiff,)	
)	MEMORANDUM OF POINTS AND
15 v.)	AUTHORITIES IN SUPPORT
)	OF VIDEOTAPE DEPOSITION
16 BENNY LOPEZ,)	AND SUBSEQUENT VOLUNTARY
17 JUAN JOSE AGUIRRE-CRUZ,)	DEPARTURE OF MATERIAL
)	WITNESSES
)	DATE: JUNE 26, 2008
)	TIME: 2:30 P. M.
18 Defendant.)	DEPT: PORTER
19 _____)	

20 I

21 BY STATUTE AND CASE LAW,
22 THE MOTION SHOULD BE GRANTED

23 According to 18 U.S.C. 3144, "no material witness may be
24 detained because of inability to comply with any condition of
25 release if the testimony of such witness can be adequately secured
26 by deposition and if further detention is not necessary to prevent
27 a failure of justice".

28 Furthermore, Fed. R. Crim. P. 15(a) specifies that a material

1 witness may make a motion requesting such a deposition and the
2 district court has the authority to order the taking of the
3 deposition and thereafter to discharge the detained witness from
4 custody.

5 As the Fifth Circuit stated in Aguilar-Ayala v. Ruiz, 973 F.2d
6 411 (1992) at page 413:

7 Read together, Rule 15(a) and section 3144 provide a
8 detained witness with a mechanism for securing his own
9 release. He must file a "written motion", Fed. R. Crim.
10 P. 15(a), requesting that he be deposed. The motion must
11 demonstrate that his "testimony can adequately be secured
12 by deposition" and that "further detention is not
13 necessary to prevent a failure of justice" 18 U.S.C.
14 section 3144. Upon such showing, the district court must
15 order his deposition and prompt release. Id. ("No
16 material witness may be detained" if he makes such a
17 showing). Although Rule 15(a) is couched in the
18 permissive "May" not the mandatory "shall", Fed. R. Crim.
19 P. 15(a) ("the court...may direct that the witness'
20 deposition be taken"), it is clear from a conjunctive
21 reading with section 3144 that the discretion to deny the
22 motion is limited to those instances in which the
23 deposition would not serve as an adequate substitute for
24 the witness' live testimony: that a "failure of justice"
25 would ensue were the witness released...**absent a "failure
26 of justice", the witness must be released.**

27 This is also the law in the Ninth Circuit as demonstrated by
28 the very recent case of Torres-Ruiz v. United States District Court
for the Southern District of California, 120 F3d 933 (9th Cir 1997).
The court "agreed with the reasoning of [Aguilar-Ayala, supra]" and
reversed Judge Huff who had denied a motion for a deposition on
facts virtually identical to the instant action . As the court
stated:

In the instant case, two young men ages 19 and 22, have
apparently been randomly selected out of a group of 27
undocumented aliens and detained for a period of over 60
days as material witnesses in a straightforward and
uncomplicated alien smuggling prosecution. These young
men state without opposition by either party to this case
that they are the sole support for their respective
families in Mexico, and that every day they remain in

1 custody is a tremendous hardship on those family members.
2 (Kilpatrick Declaration at 2) Neither petitioner is able
3 to provide a surety for \$1000.00 bond. It is exactly
circumstances such as these for which section 3144
appears to be designed.

4 Continued detention of the material witnesses after the video
5 deposition is not necessary because the videotaped deposition
6 itself is admissible evidence at trial, United States v. Canan 48
7 F. 3d 954 (6th Cir. 1995) cert. denied 116 S. Ct. 716 (1996); United
8 States v. Santos-Pinon 146 F 3d 734 (9th Cir. 1998).

9 Respectfully submitted,

10 DATED: June 26, 2008

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12 /s/_____
13 JONATHAN DAVID FRANK
14 Attorney for Material Witness
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